Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

CITY OF DEARBORN,
Petitioner,
v.
RONALD LOSCHIAVO AND DONNA LOSCHIAVO,
his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed September 8, 1994)

(RONALD LOSCHIAVO and DONNA LOSCHIAVO, Plaintiffs-Appellants, Cross-Appellees, v. CITY OF DEARBORN, Defendant-Appellee, Cross-Appellant — Nos. 92-1515/1558; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MARTIN and BOGGS, Circuit Judges; and HULL, District Judge.*

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* **The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.**

BOYCE F. MARTIN, Jr., Circuit Judge.

Maintaining that a Federal Communications Commission regulation creates a private right of action under 42 U.S.C. § 1983, Ronald and Donna Loschiavo appeal from the district court's grant of summary judgment in favor of the City of Dearborn. The City of Dearborn, in turn, cross-appeals the district court's grant of a permanent injunction precluding city enforcement of a zoning ordinance regulating the installation of satellite dish antennas. For the following reasons, we reverse the grant of summary judgment to the City and affirm the district court's entry of a permanent injunction.

I

On October 13, 1990, the Loschiavos installed a receive-only satellite dish antenna in the backyard of their single-family home in Dearborn, Michigan. The antenna is ten feet in diameter and sits atop a twenty-foot mast. Three days later, the Loschiavos received a Notice of Violation for failing to comply with Dearborn Zoning Ordinance No. 81-33, § 501-e, which requires city residents to obtain approval from the Dearborn Zoning Board of Appeals and a permit from the Dearborn Building and Safety Department before installing an antenna whose diameter exceeds three feet. The zoning ordinance also forbids the erection of antennas that are more than eight feet in diameter or more than twelve feet tall. Following a November 28 hearing, the Dearborn Zoning Board of Appeals summarily denied the Loschiavo's application for a variance and ordered the removal of the antenna by December 31.

In response, the Loschiavos filed suit in federal district court, contending that the zoning ordinance violated their rights under the First and Fourteenth Amendments. They also claimed that the ordinance was preempted by a FCC regulation, 47 C.F.R. § 25.104, which prohibits enforcement of local zoning ordinances that unduly interfere with the installation of individual satel-

lite antennas, and asserted a private right of action under 42 U.S.C. § 1983 to enforce the rights conferred by this regulation. The Loschiavos sought a permanent injunction, declaratory judgment, damages, and other relief.

After a hearing on January 9, 1992, the district court found that the zoning ordinance did not deprive the Loschiavos of their constitutional rights under the First and Fourteenth Amendments and concluded that the FCC regulation did not create "enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright* v. *Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423 (1987). Accordingly, the court granted summary judgment in favor of the City on these claims.

The Loschiavos' final claim — that the FCC regulation necessarily preempts the Dearborn zoning ordinance — proceeded to trial before the district court. Following four days of testimony, the district court, in a carefully-reasoned opinion, held that Section 25.104 preempts Dearborn Zoning Ordinance No. 81-33, § 501-e. While acknowledging that the City's ordinance had a "reasonable and clearly defined health, safety or aesthetic objective," 47 C.F.R. § 25.104(a), the court concluded that the zoning provision placed unreasonable restrictions on the installation of antennas, thereby thwarting the Loschiavos' reception of satellite signals. Because such limitations run afoul of Section 25.104's mandate, *see* 47 C.F.R. § 25.104(b) (local regulations cannot "operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas"), the district court enjoined the City from enforcing the ordinance as to the Loschiavos.

II

Asserting a right to enforce the FCC regulation under Section 1983, and to recover damages and attorneys' fees, the Loschiavos now challenge the district court's grant of summary judgment in favor of the

City.[1] This Court reviews a grant of summary judgment *de novo*. *Faughender* v. *City of North Olmsted*, 927 F.2d 909, 911 (6th Cir. 1991). Under Federal Rule of Civil Procedure 56(c), summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. We view all evidence before us in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Section 1983 creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. In *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980), the Supreme Court recognized that plaintiffs may use Section 1983 to enforce not only constitutional rights, but also those rights defined by federal statutes. As federal regulations have the force of law, they likewise may create enforceable rights. *Wright*, 479 U.S. at 431. Section 1983 is not available, however, "to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1366 (1992) (quoting *Wright*, 479 U.S. at 423).

Given that neither of the parties have suggested that the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, provides a comprehensive remedial scheme that precludes the possibility of private enforcement, we focus our attention on the second inquiry: does the regulation at issue, Section 25.104, define a right enforceable under Section 1983? Factors that bear on the resolution of this question include: (1) whether the provision was intended to benefit the plaintiff; (2) whether the provi-

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[1] **The Loschiavos have abandoned their constitutional claims before this Court.**

sion creates a binding obligation on the governmental unit, rather than merely expressing a congressional preference; and (3) whether the interest asserted is sufficiently specific as to be within the competence of the judiciary to enforce. *Wilder* v. *Virginia Hosp. Ass'n.*, 496 U.S. 498, 509 (1990).[2]

Section 25.104 arose out of the Cable Communications Policy Act of 1984. The 1984 Act was passed in part to promote the growth of satellite programming and to facilitate individual reception of unencrypted satellite signals. *See* 130 Cong. Rec. S14285 (1984) (statement of Sen. Packwood), *reprinted in* 1984 U.S.C.C.A.N. 4738, 4745. In view of this goal, Congress amended the Communications Act to authorize the receipt of unscrambled satellite programming for private viewing. While leaving intact the prohibitions against unauthorized use of radio or wire communications contained in 47 U.S.C. § 605(a), the 1984 Act added the following exclusion:

> The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual . . . of any satellite cable programming for private viewing if —
>
> (1) the programming involved is not encrypted; and
>
> (2)(A) a marketing system is not established . . . ; or
>
> (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming

---

[2] **Although some believe that the Supreme Court's recent opinion in *Suter* superseded the well-established framework set forth in *Wilder*, this Court has joined other Circuits in concluding that the two opinions may be harmonized. *See Wood* v. *Tompkins*, No. 93-3684, 1994 U.S. App. LEXIS 23498, at *17-18 (6th Cir. Aug. 29, 1994) (noting that "the *Suter* majority expressly relied on parts of *Wilder*, carefully distinguished other parts, did not overrule the earlier case, and is entirely consistent with it").**

> ha[ve] obtained authorization for private viewing under the system.

47 U.S.C. § 605(b). "Private viewing" is defined as "viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite." 47 U.S.C. § 605(d)(4).

Shortly thereafter, the FCC, concluding that local regulations regularly interfered with the right recognized by the 1984 Act to receive satellite signals for home viewing, adopted a rule preempting discriminatory local ordinances. In pertinent part, the provision provides:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

47 C.F.R. § 25.104. According to the Loschiavos, this regulation created an enforceable right within the meaning of Section 1983. We therefore turn to the three-part *Wilder* inquiry.

We have no doubt that the Loschiavos, as the owners of a satellite antenna used to receive programming for home viewing, were intended beneficiaries of this regulation. Section 25.104 was adopted to ensure that "the federally guaranteed right of earth station antenna users to receive certain satellite signals for home viewing" would not be impaired. *In the Matter of Preemp-*

tion of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C. Rcd 2172, 2172 [*sic*] (1992), *rev'd on other grounds, Town of Deerfield, New York* v. *FCC*, 992 F.2d 420, 429-30 (2d Cir. 1993). As the FCC recognized in promulgating this regulation, "[i]f individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by Section [605] to interstate communications delivered by satellite will be useless." *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519, 5522 (1986). Because Section 25.104 seeks to protect individual satellite antenna users from undue interference, we conclude that the regulation was intended to benefit the Loschiavos.

We also find that there is sufficient mandatory language in the FCC's regulation to create a binding obligation on the City of Dearborn. In unequivocal terms, Section 25.104 provides that local regulations such as Dearborn Zoning Ordinance No. 81-33, § 501-e "are preempted" if they unduly limit satellite reception or impose excessive costs on satellite antenna users. 47 C.F.R. § 25.104. While acknowledging that local governments have traditionally maintained a strong interest in zoning matters, the regulation explicitly preempts all zoning ordinances that improperly trammel an individual's right to satellite reception. *Id.*; *compare Howard* v. *City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991) (recognizing that FCC declaratory ruling PRB-1 refused to preempt local regulations, requiring instead only "a reasonable accommodation" between the antenna height desired by amateur radio operators and "the legitimate interests of local governments in regulating local zoning matters"). The mandatory language of Section 25.104 sets forth a clear command: local governments are not to enforce zoning ordinances which impose unreasonable limitations on the use of satellite antennas. *Compare Audette* v. *Sullivan*, 19 F.3d 254, 256

(6th Cir. 1994) (finding no Section 1983 cause of action where Medicaid Act merely gave state actors an "incentive," while placing "onus of compliance" upon federal officials). Given its unambiguous nature, we conclude that Section 25.104 imposes a binding obligation on the City of Dearborn.

We consider, finally, the third prong of the analytical framework established in *Wilder*. Relying in part on *Suter*'s conclusion that the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980 did not give rise to a private right of action, the City of Dearborn contends that Section 25.104 fails to define what constitutes an "unreasonable" limitation on the reception of satellite signals, thereby placing the regulation "beyond the competence of the judiciary to enforce." *Wright*, 479 U.S. at 431-32. We disagree. A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of "reasonableness." *See Wilder*, 496 U.S. at 520 (inquiry into reasonableness of Medicaid reimbursement rates is "well within the competence of the judiciary"); *Wright*, 479 U.S. at 432 (interpreting "reasonable" utility allowance). Instead, as the Supreme Court has recognized, courts are competent to interpret each statute or regulation by its own terms, considering the provision "in light of the entire legislative enactment." *Suter*, 112 S. Ct. at 1367 & n. 8. Here, the legislative history of the 1984 Act makes clear that Congress amended Section 605(b) of the Communications Act to promote individual access to diverse satellite programming. To further this goal, the FCC adopted Section 25.104, which provides unambiguous notice to local governments that zoning ordinances cannot frustrate the reception of satellite signals for home viewing. Given the straightforward nature of this provision, particularly when considered in light of the purpose of the 1984 Act, we are confident that the reasonableness standard is readily susceptible of judicial evaluation. *See also Preemption of Local Zoning*, 51

Fed. Reg. at 5524 (FCC considers it "within the ability of a court to make legal determinations of reasonableness or excessiveness").

Because we believe that the Loschiavos are entitled to bring a Section 1983 action against the City of Dearborn to enforce their right to install a receive-only satellite antenna for private viewing of satellite programming, we conclude that the district court erred in granting summary judgment in favor of the City on this claim.

III

On cross-appeal, the City of Dearborn contends that it may enforce against the Loschiavos certain portions of its zoning regulation governing the installation of satellite antennas despite Section 25.104. According to the City, the FCC regulation cannot simply override a local government's strong interest in protecting the safety of its residents and preserving the aesthetic quality of its neighborhoods. The City thus maintains that the district court erred by ruling that Dearborn Zoning Ordinance No. 81-33, § 501-e was preempted in its entirety and in permanently enjoining the City from enforcing it as to the Loschiavos.

Our review of the record does not reveal that the district court based its decision to enter a permanent injunction on erroneous legal conclusions or findings of fact. Nor did the district court abuse its discretion in fashioning the remedy. *See Basicomputer Corp.* v. *Scott*, 973 F.2d 507, 511 (6th Cir. 1992) (district court's decision to issue a preliminary injunction is reviewed for abuse of discretion and "we accept the court's findings of fact unless clearly erroneous"); *see also Crane* v. *Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) ("Our review of the district court's decision to grant a permanent injunction 'is limited to the determination of whether the district court abused its discretion in deciding that the circumstances of the case justified injunctive relief.'"). Instead, the district court

considered extensive testimony and made specific findings of fact before concluding that, with regard to the installation of a satellite antenna at the Loschiavos' residence, Dearborn Zoning Ordinance § 501-e was necessarily preempted by Section 25.104. We believe that the district court did not abuse its discretion in determining that injunctive relief was warranted and, therefore, affirm the district court's entry of a permanent injunction precluding enforcement of the zoning ordinance against the Loschiavos.

IV

For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of the City of Dearborn with respect to the Loschiavos' right to enforce Section 25.104 under Section 1983, affirm the district court's order of equitable relief, and remand for further proceedings in accordance with this opinion.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment in favor of the City of Dearborn with respect to plaintiffs Ronald and Donna Loschiavo's right to enforce Section 25.104 under 42 U.S.C. § 1983 is REVERSED. IT IS FURTHER ORDERED that the district court's order of equitable relief is AFFIRMED. The case is REMANDED for further proceedings in accordance with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

(Certification Omitted)

APPENDIX B

ORDER DENYING REHEARING EN BANC

(United States Court of Appeals — Sixth Circuit)

(Filed November 22, 1994)

(RONALD LOSCHIAVO; DONNA LOSCHIAVO, Plaintiffs-Appellants, Cross-Appellees, v. CITY OF DEARBORN, Defendant-Appellee, Cross-Appellant — Nos. 92-1515/1558)

Before: MARTIN and BOGGS, Circuit Judges; and HULL, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

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* **Hon. Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.**

APPENDIX C

ORDER GRANTING SUMMARY JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of January 9, 1992)

(RONALD LOSCHIAVO, DONNA LOSCHIAVO, Plaintiffs, vs. CITY OF DEARBORN, Defendant — Civil Action No. 90-CV-73794-DT; HON. BERNARD A. FRIEDMAN)

* * *

(3) Detroit, Michigan
Thursday, January 9, 1992
2:30 o'clock p.m.

THE CLERK: Calling case number 90-73794, *Loschiavo* versus *City of Dearborn.*

MR. GRIFFEN: Afternoon, Your Honor. John Griffen appearing on behalf of plaintiffs.

MS. WALLING: Afternoon, Your Honor. Debra Walling on behalf of City of Dearborn.

THE COURT: Okay. We have cross motions so-to-speak for summary judgment. Has there been more discussion in terms of resolving it?

MR. GRIFFEN: None, Your Honor.

THE COURT: I know the Bloomfield Township one was much easier to resolve because we had two or three acres worth of property to move the thing around or and probably a whole lot more money. But I mean, I'm prepared today. We've done a lot of work on the case. I just wish — there's no way we can work this out? The dish has to be that size?

MR. GRIFFEN: Absolutely. I know we've never had any testimony about technology, but it's in the affidavits.

THE COURT: I know.

MR. GRIFFEN: So 10 feet is what you're allowed (4) to have, that's the problem.

MS. WALLING: But, Your Honor, in those affidavits it's 10 feet to access every satellite that's in orbit, whether or not channels are coming through or not.

MR. GRIFFEN: That's not true, Your Honor.

THE COURT: Okay. What you're arguing about right now is apparently some of the factual disputes that exist here and — okay. I just — as I say, I was just hoping this particular one we could — I'm prepared to listen to some arguments and rule on this matter, but just really hoping there was some way of being able to resolve it.

MR. GRIFFEN: I never had a dish that hasn't been resolved and I've had a number of them.

THE COURT: What's the problem here on resolution?

MR. GRIFFEN: Ask the city. They've never talked to me.

MS. WALLING: Well, Your Honor, there's never been any movement from the position that they have to have it that big, and that tall, and that wide.

MR. GRIFFEN: Your Honor, I've offered to have the city come to the house with me, with their experts, if they have one — and they didn't disclose one in this case (5) — and talk about it, to look at it, see if there are alternatives. If there's an alternative, I've always been willing to explore it.

THE COURT: Your expert says there's no alternative?

MR. GRIFFEN: Absolutely none. I've asked him. I've been out with my landscape guy, satellite people, installer, president of Michigan satellite. There is no alternative. That's the problem.

THE COURT: You think there's an alternative?

MS. WALLING: Yes. The plaintiffs admit in their depositions I attached, and also the one affidavit from Mr. Postema, who had very impressive credentials, spoke to the fact that's the size needed to get all the channels. The Loryobos [*sic*] said they considered a smaller dish, but couldn't access every satellite out there. I think there's no room for movement.

THE COURT: Do they have a right to access every satellite?

MR. GRIFFEN: I don't agree with that, but let's even assume they're entitled only to reasonable reception. You have to have a 10 foot diameter or larger dish in order to receive adequate signal, reason being the satellites that are out there in orbit 22,000 miles above the Equator are C band transmissions —

(6) THE COURT: What's reasonable and unreasonable? Who sets the standard?

MR. GRIFFEN: Who sets the standard?

THE COURT: What's reasonable reception?

MR. GRIFFEN: Being able to turn on your television set and see TV. I think reasonable should be equivalent — they claim we can get on cable system, the same you may get at your house or mine, whether it's by cable or over air conventional antennas; that's all we're asking for.

The reason you can't get it with a smaller dish is the dish itself is a collecting device, collects the microwaves from the satellite. C bands are limited in power because it's the same frequency used in long distance telephone lines and the government has limited them. U band, which is used for business or commercial type communication is much higher —

THE COURT: Why is this dish a different size than the one in Bloomfield Township?

MR. GRIFFEN: It isn't. It's the same size.

THE COURT: Same size?

MR. GRIFFEN: Yes. Historically, in Michigan you find 10 foot dishes. It has to be to collect the signal. The signal's not very strong. Think of it geometrically. If you take a 10 foot dish and make it 5 foot, (7) you haven't made the dish signal smaller, but significantly reduced it by 48 percent. If you do mathematics, the — you will not collect sufficient mircrowave [*sic*] signals which are weak as it is in order to turn your TV on and be able to pull in a station without getting snow and everything else. I'll tell you another thing —

THE COURT: Every station or just some?

MR. GRIFFEN: Stations generally. I'm not talking about trying to get some — eke something from the ionosphere nobody else has had before. I'm talking about having reasonable reception.

If you could have a two foot dish and have reasonable reception the people would have them. You can not. The technology is not there. That's the problem.

I'll tell you, the technology — not technology, but the government, the FCC is changing the spacing of the satellites. They used to be four degrees apart in orbit and then reduced to three. Now they're being reduced to two. The problem with that is the larger the dish the more focused or narrow the beam width. The smaller the dish the broader the beam width. The more broader the beam width, if the satellites themselves are closer together, you'll have overlap and interference and be able to turn your TV and, unfortunately, at the same time (8) receive two or three channels and preclude your reception. That's another reason you need 10 foot dishes.

I wouldn't be surprised in the future to see they have to be 12 feet in Michigan in the future. If that's the case I don't know why these other people in Dearborn bought dishes and put them up that are less than 10 feet in diameter.

MS. WALLING: It's not just so much the width of this one, it's that it's on this 20 foot mast and the safety concerns there of, not only the neighbors, but the plaintiffs themselves. I mean, if this thing blows over . . .

MR. GRIFFEN: Your Honor, safety concerns are a bunch of hogwash, and that wasn't anything raised by the Zoning Board of Appeals when they had their hearing before them. Satellite dishes are on towers all the time. You have to have direct -

THE COURT: But they're not on a tower — I don't want to get into this because it's facts — they're not on the tower right next to somebody's house. Ever see —

MR. GRIFFEN: That's not true. They're on towers in mass all over in residential areas. It's perfectly secure.

The city can come out and test it. Their requirement is some wind withstanding that as —

(9) THE COURT: How about if there's an expert that said they could get adequate reception, reasonable reception?

MR. GRIFFEN: The FCC language is "reasonable reception."

THE COURT: Right. That's why I changed it. Says they get reasonable reception by doing it a different way. Would they be willing to do it?

MR. GRIFFEN: There is no such expert. I would certainly be able to explore that. [W]hy hasn't the City disclosed the expert?

THE COURT: The question is yes or no. If an expert comes out and says they get reasonable reception, reasonable reception may not mean they get every single channel, may not be that every single channel they get is 100 percent clear, but they can get at least that which is equivalent to say cable, I think at that time a fair —

MR. GRIFFEN: It's also an antitrust violation. I understand.

THE COURT: It's either yes or no. If that's not a sell that's okay.

MR. GRIFFEN: I've always been acceptable to exploring that.

THE COURT: How about the City? Would that be acceptable to the City?

(10) MS. WALLING: That would be great, but I can't find anybody that's not in the business of putting these things up that even wants to get involved. It's very self-serving.

THE COURT: What about if I could find somebody, and appoint that person and talk about cost? There's some people out there I'm sure — got to be somebody in academia that doesn't do it, but understands what this whole thing is about. There's also some people out there that are electrical engineers and those kinds of persons that do this that really have the expertise and so forth, that have no ax to grind, they don't work for a company.

I'm just thinking, when I was going over this case — I can tell you right now this is my brief and my bench memo on this, so I'm prepared to rule on the case but I just think from a fairness standpoint for the City as well as citizens, there must be some compromise on this whole issue because this is a win all lose all issue for both sides.

It's going to cost lots of money to try this case, and lots of time and effort. And, as I say, I think that there are people out there — and, as I say, I've been thinking about who would be the person, and I agree most of the people that have some ax to grind, installers or building inspectors, whoever, but I thought there must (11) be somebody either in academia — it's also my understanding that some of the large corporations have their own satellite systems and very, very much aware of what's going on up there and what size dishes, including the United States Government has their own satellite systems and pick-up systems. So there's people out there neutral that we could appoint that, if each side agrees that they're going to abide by the technology that — and the standard, the standard isn't every single station, it's one of reasonableness.

MR. GRIFFEN: I've never argued otherwise, Your Honor.

THE COURT: It's up to you too. I'm prepared to rule. It's up to you. Once I rule, it will kill any chance of really resolving this matter, and I don't care. It would be an interesting trial.

As I say, I think I told you last time when we had the township involved I thought the same thing. My understanding they finally resolved it and everybody's happy. I don't know. If neither side's willing, I don't care.

If that makes sense, then why don't we find that person? I'd be more than glad to explore that person and work out an arrangement. Shouldn't be lots of money. Probably less money than would cost to do a lot of other (12) things in this case. Any thoughts?

MS. WALLING: That's great, Your Honor. I mean, I've tried locally at — with local academia and there doesn't really appear to be anyone in the area. Next step would be going to Washington, D.C. Maybe some people that work for the FCC. I've got the name of one person, but he was the brother of an attorney at our office, so . . .

THE COURT: If both sides agree, and they will abide by the technical ruling because I think that's important — technical ruling of this person, I will find somebody for you that's neutral. Obviously we can't bring somebody from Washington. That would cost us just 500 to pay for air fare, but I think we can do it local. Again, I haven't explored it, but can I — is that acceptable to both sides? If it isn't, that's okay. You want time to talk to your clients?

MR. GRIFFEN: No, I've always been more than willing to do that, Your Honor. The only thing I hesitate — or to me it sounds like a binding arbitration proposal. Since I don't know who this person is — I'm absolutely confident, if it's a qualified person, he will agree with my position right down the line and won't have a problem. So that my only hesitation, though, is I don't know who that person is going to be.

To answer your question, yes, I would be happy (13) to have the Court find independent, neutral experts, if you will.

THE COURT: It almost has to be fairly binding because the City takes just the opposite position of you. Is that — you may be right, but they think they're right, but that there must be some other way of doing it that can satisfy this whole scheme of things. I can't tell you the person because I haven't started to look, but it's got to be binding. It doesn't make any sense for us to go through all this.

I would be more than happy to do is try to get as many names as I can and use the striking method, and I'm not sure I can get more than one name of someone truly knowledgeable and independent. There's got to be somebody practical, not somebody again that sits in

academia and never had practical experience. It has to be practical, both from a home owner standpoint as well as a city standpoint, as well as those other things. I think we can find a person.

MS. WALLING: Just a thought, Your Honor. I mean, something I thought of. Another way to approach it, if we have — you're ultimately going to have to decide what's reasonable in terms of how many stations these people can get. We have other residential satellite dishes in the city, and those people can tell us how many (14) stations they're receiving with a smaller dish. That's another way to approach it.

THE COURT: I am prepared to make — after listening to some testimony, the question of reasonableness. That I'm prepared to do. There's no problem. Hopefully the report will come back and say, if you do it this way you get every single station; if you do it this way you get this and this and this; and I can, through very limited testimony, home owners versus the cable company, how many channels they get, what kind of programming do they get and those kinds of things; find out what's reasonable, plus there may be some cases out there in terms of what's reasonable.

Reading what I have read so far, I think the reasonableness standard is easier to do than whether or not technology wise you could even do anything different, as counsel says you can't. If you can't, you can't. But if you can, as I say —

MR. GRIFFEN: Absolutely none of the cases cited — and I every day look to see if there's new additions, something's come down and have found an alternative. Every one of them have found preemption in favor of the home opener [*sic*].

THE COURT: It's up to you. Either say yes or no. If the answer's no, fine, I'm ready to go.

(15) MR. GRIFFEN: No, Your Honor.

THE COURT: No? Okay. Let's go. Let's argue the motions. We have plaintiffs' motion for summary judgment, defendant's motion for summary judgment.

Any matters you want to discuss? I have read the briefs and we've done a lot of work on this case.

MR. GRIFFEN: I was going to say, Your Honor, In preparing for this argument, I've read the briefs again, and I haven't read them since we filed them.

I filed a brief, counsel filed a brief, and we each replied. So, if the Court has read those briefs and the law that's been cited in them, there's absolutely nothing I can add or change to update the brief.

Oh, only thing I would point out in that regards, I think it is absolutely a FCC preemption case. I think the Court can make its ruling based upon the FCC preemption order and not go any further. I think their ordinance does differentiate, contrary to the assertion in the brief, just by looking at the ordinance itself and reading the title of the — that apply, and the fact that they only apply and restrict satellite dish antennas, so there's clearly differentiation. Then I think both of the two prong tests, there are unreasonable limitations and undue cost burdens. So I think that following the law that's cited in the brief and analysis this is definitely (16) a preemption case.

All of the cases cited, and that's all of the cases that I found that discuss this issue, discuss virtually identical provisions in ordinances in New Jersey, New York, Wisconsin, California and Michigan. And every one of them has found preemption, has found the ordinances generally under aesthetic consideration could, if you will, are really geared towards depriving some owners of the right to the satellite reception antenna, the right that the FCC — when it issued its preemption order — was trying to permit or help the home owners be able to do something that the policy of the United States allowed them to do; that is, to receive reception by satellite reception antenna as opposed to any other system they might want to use. Every case found has ruled in favor of home owners, including the Johnson case cited by defendants in support of their briefs.

The only other item was on the issue of attorney fees under 42 U.S.C. Section 1988. The early cases just routinely granted fees under Section 1988 in a preemption case and the issue was never discussed. It ultimately became an issue, apparently in the Johnson case, and also in a case I recently found that is not in anybody's brief.

There's a memorandum decision and order that was issued in the Northern District of New York on December 27th by (17) Chief Judge McKern, and he had decided on summary judgment motion in October of '91 in favor of the plaintiffs on the preemption issue, but had deferred his decision on the attorney fee issue saying "I'm not sure if 42 U.S.C. 1988 or 835 applies when the—" "—when we're dealing with an FCC order or federal regulation."

And he had briefs filed and considered the matter further, and issued his memorandum opinion December 29, which analyzes and is very good discussion of that issue, and he finds that it does apply. And, in fact, in this case has awarded the attorney fees to the Kesslers. In making that decision he relies upon Golden State Transit versus City of Los Angeles, which is U.S. Supreme Court opinion from 1989 —

THE COURT: How does he deal with Johnson? I'll deal — take a look at it.

MR. GRIFFEN: The opinion does not discuss Johnson at all. I've also requested copies of briefs because I wanted to see if either side addressed the Johnson issue. But because I just got this yesterday —

THE COURT: He doesn't address Johnson.

MR. GRIFFEN: Not in the memorandum, but his analysis is very good, and opposite view of Johnson.

I thought this Court, before it rules, ought to at least have the benefit —

(18) THE COURT: I'd like to take a look at it. Do you have a copy?

MR. GRIFFEN: I have an extra copy I will provide to the Court.

THE COURT: I'll take a look at it.

MR. GRIFFEN: Would you like it right now?

THE COURT: Yes, sure, please.

MR. GRIFFEN: I'll also give one to opposing counsel, Your Honor.

THE COURT: Thank you. Appreciate it.

Okay. Anything else?

MR. GRIFFEN: Nothing further, Your Honor.

THE COURT: Any argument?

MS. WALLING: Just a couple comments, Your Honor. Obviously we think our ordinance doesn't discriminate. In fact, I supplied that affidavit that shows the way we enforce the ordinance is not discriminatory.

If you go beyond that and get to the reasonableness two prong test, I'd just like to make a comment that key word "reasonable," you have to look at the community, you know. And when counsel says these cases are identical and the plaintiffs always win, well, none of them are identical with respect to changes from community to community and ordinance to ordinance. And, (19) you now [*sic*], I wish that the FCC would have said, when they imposed these rulings, height, diameter, done whatever they wanted. Instead their footnotes say we wanted to give municipalities some flexibility to control their own communities.

Well, in Dearborn you have — it's an older community. Comparatively, you have smaller lots, older homes, you know. The Loryobos have a 50 foot lot. Theirs is one of the bigger ones. We have lots in Dearborn that start at 30 feet, subdivisions like that. When you look at the size of the lots and the size of the homes, then look to this 12 foot high and 8 foot diameter standard, that is reasonable. Specially when you think about, if these were to fall, and the aesthetics. I mean, there are obvious reasons for 12 feet and 8 feet. And I think you really have to look at the character of Dearborn.

Along those lines, you know, counsel mentioned in his brief — and I have to talk about it a little bit, you know — Dearborn is arrogant in imposing these sorts of

requirements. I want to say that we are far from it, being an older community with small homes and small lots.

The suburbs have plenty of bigger, more modern homes available on larger pieces of property. The things we have to do to keep our residents and track our residents are to protect our quality of life you can have (20) in a community such as Dearborn, and we think that this type of regulation of dishes is reasonable. We allow them, we don't prohibit them, but we don't want them to be unsightly or unsafe.

The last point I'd like to make deal with the rule itself. I realize at the time it was passed satellite dishes were new. You know, the companies were afraid that municipalities were going to keep them out because they were unsightly, or for whatever reason.

I think the rule nas been very effective. Now satellites are everywhere. And the effect has been that the rules have been so effective that it's now obsolete because nobody is building any other kinds of antennas. Nobody's putting up VHF antennas anymore anyway. So, to say that an ordinance shouldn't differentiate between satellites and other antennas is fine. The fact is, nobody's putting any other kind up anyway, so those are the only kind we're talking about these days.

With that, Your Honor, and everything else that's been filed, that's all I have.

THE COURT: Okay. In this matter the law is such that the ordinance is preempted by the FCC regulation, if the city ordinance is shown to differentiate between satellite antennas and others.

The Court in this particular matter believes the (21) Dearborn ordinance does differentiate between antenna types on its face, just even the title. However, once that question is decided, the ordinance must pass a two prong test. And the test, as we all know, is reasonableness, and clearly defined health, safety, aesthetics; that's number one.

2. Limitations must be reasonable and costs not excessive. And, as we've heard here today, there's a big question as to the second part of the test.

I think the first part of the test the Court believes has been met. It's the second part that really is disputeable [*sic*], whether the ordinance as written, whether there's — the costs are excessive in light of the purchase, and installation costs an[d] so forth.

Therefore, as to that portion, both partys' [*sic*] motion for summary judgment is denied as to that issue.

The next issue we have is the 1st Amendment claim.

The Court believes that defendant's motion for summary judgment should be granted and plaintiffs' motion denied.

As to this issue, the Court believes the courts are correct and designed to serve substantial government interest and not unreasonably limit alternative avenues of communication based on the 1st Amendment. It serves (22) substantial government interest. For all those reasons the Court believes the defendant's motion should be granted.

The 14th amendment. In relation to this one, the Court believes the state and local government does have broad authority under their police powers to regulate the uses of private lands. However, it must relate to welfare, safety, health and so forth, and including aesthetics. I think the law's pretty clear as to that, and the Court believes that this particular ordinance complies.

The defendant's motion for summary judgment again should be granted and plaintiffs' denied as to this issue.

The 1983 claim is a bit different, and I've read Judge Kern's [*sic*] decision just now, which is obviously contrary to the Johnson decision. And, again as counsel indicated, he just received it and it's dated very, very recently. He hasn't seen whether or not Judge McKern was aware of the decision in Johnson. But I think the reasoning in Johnson in analyzing this case is what the Court believes the state of the law as it exists today.

The reasoning Johnson, the Court believes, is proper. And, therefore, the Court will adopt the reasoning in Johnson.

(23) The Court in that case held that it was not the intent of legislature, in enacting the statute, to create such a cause of action.

And, also in relation to that particular issue, the Court will grant defendant's motion for summary judgment and deny plaintiffs' motion for summary judgment, realizing that there is a split as to the 1983 claims, but I think that that's the way to go on this particular one.

So we have, basically, one issue left, and that issue is the second part of the two prong test. And I think that's the main issue, listening to arguments here trying to resolve that, probably the main issue we have left in relation to this.

I think we have a trial date coming up fairly quickly, do we not?

MR. GRIFFEN: January 21st.

THE COURT: How does that look? Look good for everybody?

MR. GRIFFEN: The trial date is fine with me. I guess my question is, we also have a final pretrial conference scheduled for the 13th coming up quickly. My only question in that regard, I have not — or have not started to put together a pretrial statement pending the hearing.

THE COURT: I appreciate that.

(24) MR. GRIFFEN: Are we still going to follow that same schedule?

THE COURT: Yes, I just asked to make sure we're on schedule. Looks like we're going to be pretty much on schedule. When you come in on the 13th we'll set an exact date. It should be around the 21st. I think the issues are substantially narrowed down and we'll go from there.

Anything else we should talk about?

MS. WALLING: Thank you.

THE COURT: We'll do the order.

MR. GRIFFEN: Thank you.

APPENDIX D

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

(United States District Court —
Eastern District Of Michigan —
Southern Division)

(Dated February 11, 1992)

(RONALD LOSCHIAVO, DONNA LOSCHIAVO, Plaintiffs, vs. CITY OF DEARBORN, Defendant — Civil Action No. 90-CV-73794-DT; HON.BERNARD A. FRIEDMAN)

This matter is before the court on plaintiffs' motion for reconsideration, filed January 23, 1992. Pursuant to Rule 7.1(e)(2) of the Local Rules of the United States District Court for the Eastern District of Michigan, this motion will be decided without oral hearing.

Plaintiff seeks reconsideration of the court's January 13, 1992, order granting defendant's motion for summary judgment as to Count IV of plaintiff's amended complaint. Count IV sought an award of attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988.

Motions for reconsideration are governed by Local Rule 7.1(h)(3), which provides:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, whether expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Here, plaintiffs have failed to demonstrate "a palpable defect" by which the court has been misled, nor would a different disposition result. Accordingly,

IT IS ORDERED that plaintiffs' motion for reconsideration is denied.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: FEBRUARY 11, 1992
Detroit, Michigan

(Certificate of Mailing Omitted)

APPENDIX E

JUDGMENT AND MEMORANDUM OPINION

JUDGMENT

(United States District Court —
Eastern District Of Michigan —
Southern Division)

(Dated March 17, 1992)

(RONALD LOSCHIAVO, DONNA LOSCHIAVO, Plaintiff, vs. CITY OF DEARBORN, Defendant — Case No. 90-CV-73794-DT; Honorable Bernard A. Friedman)

In accordance with the findings of fact and conclusions of law submitted in this matter in a Memorandum Opinion dated March 17, 1992, pursuant to Fed. R. Civ. P. 52,

IT IS ORDERED AND ADJUDGED that judgment be and hereby is, entered in favor of plaintiffs and against defendant. Costs to be allowed as permitted by law.

Dated at Detroit, Michigan, March 17, 1992.

/s/ JOHN P. MAYER
CLERK OF THE COURT

By: /s/ [*Illegible*]
Deputy Clerk

Approved:
/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

In this civil action, plaintiffs seek declaratory and injunctive relief to prevent the defendant city from enforcing its ordinance that prohibits satellite dishes

wider than eight feet in diameter and mounted higher than twelve feet. Plaintiffs assert that the ordinance is preempted by Federal Communications Commission regulations[1] because the ordinance unreasonably limits reception and imposes excessive costs upon the users.

The case was tried by the court. After consideration of all the testimony and exhibits received into evidence, the court makes the following findings of fact and conclusions of law, as required by Fed. R. Civ. P. 52.

Background

Plaintiffs Ronald and Donna Loschiavo own a single family residence in Dearborn. On October 13, 1990, they installed a satellite dish in their backyard. The dish is ten feet in diameter and is mounted on a twenty-foot mast. Three days later they received a Notice of Violation for failure to comply with Dearborn Zoning Ordinance No. 81-33, § 501-e *et seq.* The ordinance requires that anyone installing a satellite dish antenna that exceeds three feet in diameter must first obtain approval from the Dearborn Zoning Board of Appeals and a permit to erect an antenna from the Dearborn Building and Safety Department. The ordinance forbids dishes in excess of eight feet in width and twelve feet in height.

Subsequently, plaintiffs applied to the Zoning Board for approval of their satellite dish antenna. At the November 28, 1990, hearing, the Board denied plaintiffs' application. Plaintiffs were ordered to remove their antenna by December 31, 1990. Plaintiffs refused to remove the antenna and filed this suit.[2] They seek declaratory and injunctive relief to prevent the city

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1 **47 C.F.R. § 25.101, *et seq.***

2 **The court granted summary judgment in favor of defendant on plaintiffs' claims under 42 U.S.C. § 1983, based on alleged violations of plaintiffs' rights under the first and fourteenth amendments to the United States Constitution.**

from enforcing the ordinance. They claim that an FCC regulation preempts the ordinance and prohibits its enforcement.

Plaintiffs' claim is based on 47 C.F.R. § 25.104, which provides in part:

> State and local zoning or other restrictions that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective, and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation costs of the equipment.

As a threshold issue, then, the regulation will preempt an ordinance only if it differentiates between satellite receive-only antenna and other types of antenna facilities. Once such differentiation is shown, then the ordinance survives only by meeting both prongs (a) and (b) above. In denying defendant's motion for summary judgment on this issue, the court found that the threshold was met, making it necessary to consider both parts of the test. The court also found that the ordinance has a reasonable and clearly defined health, safety or aesthetic objective, sufficient to meet the first part of the test. However, the court found that a question of fact remained as to whether the second prong was met. The trial focused on this question.

Findings of Fact and Conclusions of Law

Subsection (b) of the regulation can be broken down into three parts: 1) an ordinance may not impose unrea-

sonable restrictions on reception; 2) an ordinance may not prevent reception; and 3) an ordinance may not impose excessive costs upon users. The Dearborn ordinance forbids dishes in excess of eight feet in width and twelve feet in height. While it permits the Board of Zoning Appeals to authorize additional uses if they are "in harmony with the character of the district,"[3] the ordinance contains no express provisions for variances where houses, garages, trees, fences, etc., block the sight lines necessary for satellite transmission. Plaintiffs claim that this violates the first requirement of subsection (b) because it imposes unreasonable restrictions on reception.

Defendant erected a satellite dish that complies with the ordinance (the "Caverne dish") on the lot adjacent to plaintiffs' lot, in an effort to show that such a dish could receive substantially the same programming as plaintiffs' dish.[4] The testimony revealed that the Caverne dish receives signals from seventeen satellites, but not the F-1 signal because it is blocked by trees to the west. The court had an opportunity to view reception on this dish and plaintiffs' dish on February 14, 1992, and found that reception on the two dishes was substantially the same. However, defendant's own witness, Tom Lovachis, who installed the Caverne dish, testified at trial that during the spring and summer months when more leaves are on the trees, reception on the Caverne dish would be blocked for all but the far southeastern satellites. Mr. Lovachis stated that his crew initially walked off the job because it was his recommendation that, given the city's restrictions, the system should not be installed. He testified: "I don't believe there's going to be much reception there at all." Mr.

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3 §§ 203.6, 203.7.

4 The Caverne dish is 7.5 feet in diameter and twelve feet above grade and complies with the Dearborn ordinance.

Lovachis also testified that a dish in compliance with the ordinance anywhere on plaintiffs' property would receive no reception "virtually at all in eight months out of the year."

Based on this testimony, the court finds that the ordinance unreasonably restricts reception in violation of the FCC regulation because it contains no express provision for variances for dishes on property where the satellite sight lines are blocked. The provision allowing additional uses where they are "in harmony with the character of the district" is inadequate because it balances aesthetic concerns with the right to reception. While the city's aesthetic concerns are legitimate and plaintiffs' satellite dish definitely could be considered aesthetically displeasing, this court is bound by the legislative intent of the FCC to forbid unreasonable restrictions on reception. The court cannot balance this intent with aesthetic concerns. The regulation absolutely entitles plaintiffs to be free of unreasonable restrictions on reception. Although the ordinance may be valid as to properties on the south side of the city, where sight lines to satellites are direct, nowhere on plaintiffs' property could they erect a dish in compliance with the ordinance and receive reasonable reception. Therefore, the ordinance is pre-empted by the regulation and is unenforceable, as applied to this case and generally, unless the city makes provisions to accommodate situations where surrounding structures make it impossible to erect a dish that complies with the ordinance and receives reasonable reception.

Conclusion

Because the Dearborn ordinance effectively forbids plaintiffs from having a satellite dish that receives reasonable reception, the ordinance is preempted by the FCC regulation and defendant shall be enjoined from

enforcing it as to plaintiffs. Accordingly, judgment shall be granted for plaintiffs.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: MARCH 17, 1992
Detroit, Michigan

(Certificate of Mailing Omitted)

APPENDIX F

FEDERAL AND STATE STATUTES INVOLVED

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42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

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42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and

changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

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47 U.S.C. § 605

§ 605. Unauthorized publication or use of communications

(*a*) Practices prohibited

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent

jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

(*b*) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if —

(1) the programming involved is not encrypted; and

(2)(A) a marketing system is not established under which —

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

(c) Scrambling of Public Broadcasting Service programming

No person shall encrypt or continue to encrypt satellite deliveree programs included in the National Program Service of the Public Broadcasting Service and intended for public viewing by retransmission by television broadcast stations; except that as long as at least one unencrypted satellite transmission of any program subject to this subsection is provided, this subsection shall not prohibit additional encrypted satellite transmissions of the same program.

(d) Definitions

For purposes of this section —

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified

or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (d)[1] of this section shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(*e*) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

(1) Any person who willfully violates subsection (a) of this section shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or

imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of subsection (d)[1] of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court —

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the

elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $ 1,000 or more than $ 10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $ 10,000, or more than $ 100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $ 100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $ 250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a) of this section,

shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established heroin as it applies to each such device shall be deemed a separate violation.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this subchapter.

(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a) of this section.

(*f*)[2] Rights, obligations, and liabilities under other laws unaffected

Nothing in this section shall affect any right, obligation, or liability under Title 17, any rule, regulation, or order thereunder, or any other applicable Federal, State or local law.

(*f*)[2] Universal encryption standard

Within 6 months after November 16, 1988, the Federal Communications Commission shall initiate an inquiry concerning the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing. In conducting such inquiry, the Commission shall take into account —

(1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;

(2) incorporation of technological enhancements, including advanced television formats;

(3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable, programming;

(4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable programming, including cable systems and satellite master antenna television systems;

(5) the effect of any such standard on competition in the manufacture of decryption equipment; and

(6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.

(g) Rulemaking for encryption standard

If the Commission finds, based on the information gathered from the inquiry required by subsection (f) of this section, that a universal encryption standard is necessary and in the public interest, the Commission shall initiate a rulemaking to establish such a standard.

(June 19, 1934, c. 652, Title VII, § 705, formerly Title VI, § 605, 48 Stat. 1103; June 19, 1968, Pub. L. 90-351, Title III, § 803, 82 Stat. 223; Sept. 13, 1982, Pub. L. 97-259, Title I, § 126, 96 Stat. 1099; renumbered and amended Oct. 30, 1984, Pub. L. 98-549, §§ 5(a), 6(a), 98 Stat. 2802, 2804; Nov. 7, 1988, Pub. L. 100-626, § 11, 102 Stat. 3211; Nov. 16, 1988, Pub.L. 100-667, Title II, §§ 204, 205, 102 Stat. 3958, 3959.)

TERMINATION OF SUBSECTIONS (f) AND (g)

Section 207 of Pub. L. 100-667 terminated subsecs. (f) and (g), effective Dec. 31, 1994. See Effective and Termination Dates note set out under section 119 of Title 17, Copyrights.

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1 **So in original. Probably should be "subsection (e)".**

2 **So in original. There are two subsections designated (f).**

47 C.F.R. § 25.104

PART 25 — [AMENDED]

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 25) is amended as follows:

1. The authority citation for Part 25 continues to read as follows:

> *Authority:* Sections 25.101 to 25.531 issued under sec. 4.48 Stat. 1066, as amended: 47 U.S.C. 54. Interpret or apply Secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. By adding new § 25.104 as follows:

§ 25.104 Preemption of local zoning of earth stations.

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safely regulation is not preempted.

Statement of Commissioner Mimi Weyforth Dawson Dissenting in Part

Re: Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations. CC Docket 85-87.

If this decision were consistent with the press reports of it, I might be inclined to support it.[1] Unfortunately, since I cannot support the Commission's blessing of either blanket bans against all communications antennas or local ordinances which allow discrimination *in effect* against satellite antennas [TVROs], I must dissent in part.

A careful reading of the rule adopted by this decision reveals Just how narrow the Commission's preemption is. The rule adopted by the majority essentially divides local ordinances into two categories: (1) Those local ordinances which "differentiate between . . . [TVRO] antennas and other types of antenna facilities"[2]; and (2) those which do not "differentiate". This latter group falls entirely outside the majority's rule and, thus, is not preempted or otherwise affected by the rule.

However, this dichotomy creates — and seems intended to create — an enormous loophole which I cannot support. First, since blanket bans against *all* antennas (or blanket bans which grandfather existing antennas) do not "differentiate" among types of antennas, they are entirely permissible under the majority's rule. And this ability to ban all antennas rests with the local authority whether or not the ban involves some nationally registered historic district since the

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1 For example, the Associated Press reported that "[t]he only way local zoning authorities can ban the use of backyard or rooftop satellite TV receiving dishes is by showing they violate a 'reasonable and clearly defined health, safety or aesthetic' consideration". As shown above, this is clearly incorrect. Similarly, it is incorrect to say, as reported by the *New York Times*, that in order to be valid "zoning regulations limiting homeowners' right to install [TVRO] antennas 'must have a reasonable and clearly defined' health, safety or aesthetic objective."

2 Even those ordinances which *do* discriminate are not necessarily prohibited. The rule allows discriminatory ordinances as long as they "have a reasonable and clearly defined health, safety or aesthetic objective" and do not "impose unreasonable limitations on, or prevent" TVROs or impose "excessive costs" of TVROs.

majority's rule simply suggests no different treatment for historic districts.

Moreover, the majority's reading of "differentiate" allows numerous rules which *have the effect* of discriminating against TVROs. For example, the majority seems to include within the definition of "differentiate" only those ordinances which separate TVROs by name or those which identify some "shape" characteristic unique to TVROs (as an ordinance which prohibits spherical antennas). Other ordinances — even if they have the *effect* of discriminating against TVROs — do not come within the ambit of the majority's rule and, thus, are not preempted by the Commission.

Such ordinances are not difficult to imagine. For example, a city ordinance might prohibit all antennas over eight feet tall or might prohibit all antennas which are more than 20 feet high and more than three feet wide. Neither ordinance, in the majority's view, would "differentiate" between TVROs and other antennas because neither would single out TVROs by name or "shape". But each would have the *effect* of prohibiting satellite antennas.

I cannot support such a local blanket veto power over interstate communications. In 1984 Congress amended the Communications Act to recognize the legal right (with certain enumerated exceptions) of individuals to intercept and receive "any satellite cable programming for private viewing". 47 U.S.C. Sec. 705. By allowing localities to prohibit satellite antennas as part of a blanket ban or as the effect of some "non-discriminatory" ordinance, I think we do great damage to that Congressional goal.

In addition this decision is wholly inconsistent with the Commission's recently announced policy with regard to SMATV and amateur antennas. In its SMATV decision, the Commission explicitly stated that local regulation could not "inhibit or interfere with the

delivery of interstate [SMATV] signals" and that local regulation could not discriminate *in fact* or be "undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective". *Earth Satellite Communications, Inc.*, 95 F.C.C. 2d 1223 (1983).[3]

Likewise, in its amateur antenna decision, the Commission clearly and unequivocally said that "[s]tate and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." *Federal Preemption of State and Local Regulations*. And the Commission stated that "local regulations which involve placement screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." *Id.* It is difficult to square these policies with a TVRO rule which allows localities to prohibit satellite antennas.

Finally, I simply cannot understand this decision in its attempt to reconcile these various pronouncements by stating the objective "to ensure that satellite receiving antennas are not treated less favorably than other antenna devices such as Satellite Master Antenna System (SMATVs) and Amateur Radio antennas." *Decision* at para. 33 (footnote omitted). How can this be the case if on the one hand localities are prohibited from banning amateur and SMATV antennas but may ban TVROs (and broadcast antennas for that matter)?

I would be less concerned about this had the discussion at the Commission meeting produced a consistent well-reasoned explanation for these obvious conflicts.

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3 On reconsideration the Commission declined to go further and preempt all local zoning regulation by noting that that "is not appropriate for discussion here" and that the "scope of the initial proceeding did not include review of this issue." Slip Op. at para. 6.

But what I fear that we have done is leave the area hopelessly confused. Indeed, I am unable to read this language and discover whether the Commission intended to conform the TVRO decision to its previous decisions or, as seems more likely, to conform its previous decisions to the TVRO decision — without the requisite record or notice for doing so.

While I am sympathetic to localities' traditional role in use planning,[4] this is not a purely local issue. It involves the right of individuals, as guaranteed by the First Amendment and the Communications Act, to receive interstate communications. As Senator Goldwater said in introducing S.R. 35,

> as a political conservative, I believe that each State possesses broad authority and responsibility on a wide range of subjects. However, the basic question here is not Federal preemption of local powers. It is whether cities and counties can thwart a clear national policy which has been repeatedly enunciated by the Congress and the FCC to encourage the development of new communications technologies and services in the public interest.
>
> 131 Cong. Rec. 5357 (January 3, 1985, statement of Sen. Goldwater).

Accordingly, insofar as the majority's decision allows localities to ban all antennas or to discriminate against TVROs in effect, I dissent.

[FR Doc. 86-3258 Filed 12-13-86; 8:45 am]

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4 Requiring a TVRO to be securely fastened or requiring that it be as unobtrusive as practicable would, as far as I am concerned, be reasonable local regulation and would comport with states' traditional police power. However, I cannot agree that this power to regulate includes the power to prohibit. In addition, it seems possible that, to accommodate the competing federal policies of fostering interstate communications and preserving historic areas, the Commission could adopt a liberal waiver policy or even an exemption for areas covered by the national Historic Preservation Act. 16 U.S.C. Secs. 470, *et seq.*

MICH. COMP. LAWS § 125.581

P.A.1921, No. 207, Imd. Eff. May 17

AN ACT to provide for the establishment in cities and villages of districts or zones within which the use of land and structures, the height, the area, the size, and location of buildings may be regulated by ordinance, and within which districts regulations shall be established for the light and ventilation of those buildings, and within which districts or zones the density of population may be regulated by ordinance; to designate the use of certain state licensed residential facilities; to provide by ordinance for the acquisition by purchase, condemnation, or otherwise of private property which does not conform to the regulations and restrictions of the various zones or districts provided; to provide for the administering of this act; to provide for amendments, supplements, or changes hereto; to provide for conflict with the state housing code or other acts, ordinances, or regulations; and to provide penalties for the violation of the terms of this act. Amended by P.A.1947, No. 272, Eff. Oct. 11; P.A.1976, No. 396, § 1, Eff. March 31, 1977.

The People of the State of Michigan enact:

125.581. Regulation and restriction of use of land and structures

Sec. 1 (1) The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other

public service and facility needs; and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations.

(2) The land development regulations and districts authorized by this act shall be made in accordance with a plan designed to promote and accomplish the objectives of this act.

MICH. COMP. LAWS § 125.585

125.585. Board of appeals; appointment; duties, procedure; appeals; remuneration; finality of decision: judicial review

Sec. 5. (1) The legislative body of a city or village may act as a board of appeals upon questions arising under a zoning ordinance. The legislative body may establish rules to govern its procedure as a board of appeals. In the alternative, if the legislative body of a city or village desires, the legislative body may appoint a board of appeals consisting of not less than 5 members, each to be appointed for a term of 3 years. Appointments of the first members shall be for terms of 1, 2, and 3 years, respectively, so as nearly as possible to provide for the appointment of an equal number of members each year. After the initial appointments, each member shall hold office for the full 3-year term.

(2) In accord with procedures specified in the zoning ordinance, the legislative body of a city or village may appoint not more than 2 alternate members for the same term as regular members of the board of appeals.

The alternate members may be called on a rotating basis as specified in the zoning ordinance to sit as regular members of the board of appeals in the absence of a regular member. An alternate member may also be called to serve in the place of a regular member for the purpose of reaching a decision on a case in which the regular member has abstained for reasons of conflict of interest. The alternate member having been appointed shall serve in the case until a final decision has been made. The alternate member shall have the same voting rights as a regular member of the board of appeals.

(3) The board of appeals shall hear and decide appeals from and review any order, requirements, decision, or determination made by an administrative official or body charged with the enforcement of an ordinance adopted under this act. The board of appeals shall also hear and decide matters referred to the board or upon which the board is required to pass under an ordinance of the legislative body adopted under this act. For special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance.

(4) In a city or village having a population of less than 1,000,000, the concurring vote of a majority of the members of the board shall be necessary to reverse an order, requirement, decision, or determination of an administrative official or body, or to decide in favor of the applicant a matter upon which the board is required to pass under an ordinance, or to effect a variation in an ordinance except that a concurring vote of ⅔ of the members of the board shall be necessary to grant a variance from uses of land permitted in an ordinance. In a city having a population of 1,000,000 or more, the concurring vote of ⅔ of the members of the board shall be necessary to reverse an order, requirement decision, or determination of an administrative official or body, or to decide in favor of the applicant a matter upon which the board is required to pass

under an ordinance, or to effect a variation in an ordinance.

(5) An appeal may be taken by a person aggrieved, or by an officer, department, board, or bureau of the city or village. If a city or village has created or may create a board of rules or board of building appeals, that board may be enlarged to consist of not less than 5 members, and these may be appointed as the board of appeals as provided in this section.

(6) An appeal under this section shall be taken, within a time prescribed by the board of appeals by general rule, by the filing with the officer or body from whom the appeal is taken and with the board of appeals of a notice of appeal specifying the grounds for the appeal. The officer or body from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(7) An appeal under this section stays all proceedings in furtherance of the action appealed from unless the officer or body from whom the appeal is taken certifies to the board of appeals, after the notice of appeal is filed, that by reason of facts stated in the certificate, a stay would in the opinion of the officer or body cause imminent peril to life or property, in which case the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the circuit court, on application, on notice to the officer or body from whom the appeal is taken and on due cause shown.

(8) The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice of the appeal to the persons to whom real property within 300 feet of the premises in question is assessed, and to the occupants of single and 2-family dwellings within 300 feet, the notice to be delivered personally or by mail addressed to the respective owners and tenants at the

address given in the last assessment roll. The board of appeals shall decide the appeal within a reasonable time. If the tenant's name is not known, the term occupant may be used. Upon the hearing, a party may appear in person or by agent or by attorney.

(9) The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and shall make an order, requirement, decision, or determination as in the board's opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal is taken. If there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance, the board of appeals may in passing upon appeals vary or modify any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.

(10) The board of appeals may impose conditions upon an affirmative decision, as provided in section 4c(2).[1] The legislative body of any city or village may authorize the remuneration of the members of the board for attendance at each meeting.

(11) The decision of the board of appeals shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to insure that the decision meets all of the following:

(a) Complies with the constitution and laws of this state.

(b) Is based upon proper procedure.

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1 Section 125.584c(2).

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

(12) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that additional evidence exists which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court.

(13) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

Amended by P.A.1986, No. 191, § 1, Imd. Eff. July 8.

MICH. COMP. LAWS § 125.590

125.590. Review by circuit courts; appeals to supreme court; procedure

Sec. 10. Any party aggrieved by any order, determination or decision of any officer, agency, board, commission, board of appeals, or the legislative body of any city or village, made pursuant to the provisions of section 3a of this act[1] may obtain a review thereof both on the facts and the law, in the circuit court for the county wherein the property involved or some part thereof, is situated: Provided, That application is made to the court within 30 days after delivery of a copy of such order, determination or decision, by certiorari or by any

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1 Section 125.583a.

other method permissible under the rules and practices of the circuit courts of this state. On such review the courts shall have jurisdiction to make such further orders in respect thereto as justice may require. An appeal may be had from the decision of any circuit court or condemnation court to the supreme court in the same manner as provided by the laws of this state with respect to appeals from circuit courts; and in the event of such appeal, the issue of non-conformity may be reviewed as an issue of law in the supreme court.

CITY OF DEARBORN ZONING ORDINANCE
No. 81-33, § 501-e

501-e DISH-TYPE SATELLITE SIGNAL-RECEIVING ANTENNAS:

1. "Dish-type Satellite Signal-Receiving Antennas," also referred to as "earth stations" or "ground stations" shall mean one, or a combination of two or more of the following:

a. A signal-receiving device (antenna, dish antenna, or dish-type antenna), the purpose of which is to receive communication or other signals from satellites in earth orbit and other extraterrestrial sources.

b. A low-noise amplifier (LNA) which is situated at the focal point of the receiving component and the purpose of which is to magnify, store, transfer and/or transmit electronic or light signals.

c. A coaxial cable the purpose of which is to carry or transmit said signals to a receiver.

2. "Receiver" shall mean a television set or radio receiver.

3. "Dish" shall mean that part of a satellite signal receiving antenna characteristically shaped like a saucer or dish, being larger than three feet in diameter.

This ordinance shall not apply to earth stations with a dish diameter three feet or less.

4. "Grounding rod" shall mean a metal pole permanently positioned in the earth to serve as an electrical conductor through which electrical current may safely pass and dissipate.

501-e.101 PERMIT REQUIRED

No person, firm, partnership, corporation, trust or other legal entity shall construct an earth station larger than three feet in diameter without approval of the Zoning Board of Appeals and obtaining a permit from the Dearborn Building & Safety Department. No contruction [*sic*] shall commence before a permit is issued in accordance with Section 203 of the Fee Ordinance known as City of Dearborn Ordinance 88-425. Nor shall a person, firm, partnership, corporation trust or other legal entity operate a temporary or portable earth station without first obtaining a permit from the City of Dearborn Building & Safety Department.

501-e.102 APPLICATION FOR PERMIT

Any person who desires to construct an earth station having a dish diameter larger than 3 feet on any lot, premises or land parcel located in the City of Dearborn must appear before the Zoning Board of Appeals who must approve the location and size of the earth station and must first obtain a permit to erect the earth station from the City of Dearborn Building & Safety Department. The person seeking the permit must provide evidence to the Building & Safety Department that the owner of the lot, premises or land parcel where the earth station is to be located has no objection to its construction and is willing to assume all liability of its construction, operation and use.

The Building Department shall issue such permit provided the applicant has Zoning Board approval and submits a written application upon forms provided and

approved by the Building & Safety Department, along with a plot plan of the lot, premises or land parcel attached, showing the exact location and dimensions of the proposed earth station; a description of the kind of earth station proposed; the exact location and dimensions of all buildings or structures; construction plans and specifications prepared by a professional engineer or other qualified technical personnel showing the elevations of the proposed earth station upon completion; and a structural engineering analysis. Each application shall specify among other things the name and address of the owner of the real estate; the applicant and his/her relationship to the owner; the professional engineer, or other qualified technician, who prepared the construction plans and specifications; and the person to be permitted to construct the proposed earth station.

The applicant shall present documentation of the possession of any license or permit required by any federal, state or local agency pertaining to the ownership, construction or operation of an earth station.

The applicant must comply with the provisions of Ordinance No. 88-425 which is the Fee Ordinance of the City of Dearborn. The permit fee shall cover the costs of reviewing the construction plans and specifications, inspecting the final construction and processing the application.

501-e.103 LOCATION OF EARTH STATION

1. Ground-mounted

    a. No earth station shall be constructed in any front or side yard. All earth stations must be constructed to the rear of the residence or main structure.

    b. No earth station, including its concrete base slab or other substructure, including the dish itself, shall be constructed less than five (5) feet from any property line or easement.

c. No earth station shall be constructed without appropriate evergreen landscaping, or other approved method of screening, to reasonably conceal said earth station from view.

d. No earth station shall be linked, physically or electronically, to a receiver which is not located on the same lot, premises or parcel of land as is the earth station.

e. An earth station shall not exceed a grade height of twelve (12) feet or a dish diameter of 8 feet.

f. All structural supports shall be of galvanized metal.

g. Wiring between an earth station and a receiver shall be placed at least four (4) inches beneath the surface of the ground in compliance with the National Electric Code.

h. Such earth station shall be designed to withstand a wind force of one hundred (100) miles per hour without the use of supporting guy wires.

i. Any driving motor shall be limited to 110V maximum power design and be encased in protective guards.

j. An earth station must be bonded to a grounding rod.

2. Roof-mounted

a. Any person seeking a roof mounted earth station must establish, by conclusive, objective evidence, they are unable to locate the earth station anywhere else on the property in question. The Zoning Board of Appeals, in making their decision to grant or deny the request for a roof mounted antenna, must consider the following factors:

(1) The safety of the property owner and surrounding property owners in allowing a roof mounted earth station.

(2) The aesthetic impact of the roof mounted earth station on the surrounding neighborhood and the comments of the neighborhood and the comments of the neighbors in this regard.

(3) Safety of the surrounding property owners and the aesthetic impact of the roof mounted earth station shall outweigh any increased cost to the applicant in locating the earth station on the ground as opposed to the roof.

(4) If a roof mounted antenna is permitted, it shall perferably [*sic*] be located on a garage or other accessory structure, or as a poledown mount, as opposed to the roof of a residential dwelling.

b. The intent of this ordinance is to ensure the safety and welfare of the surrounding property owners and aesthetic factors associated with roof mounted earth stations. Those parties granted (permission to erect) roof mounted stations must comply with the installation and limitations described in Sections c through h.

c. Earth stations shall be mounted directly upon the roof of a primary or accessory structure, as defined in the Building Code, and shall not be mounted upon appurtenances such as chimneys, towers, trees, or spires.

d. An earth station shall not exceed beyond the highest point of the ridge line of the roof it is mounted on. On structures with a flat

roof, it shall not exceed a total height of fifteen (15) feet above the surface of the roof.

e. An earth station "dish" shall not exceed eight (8) feet in diameter.

f. An earth station shall be designed to withstand a wind force of one hundred miles per hour without the use of supporting guy wires.

g. Any driving motor shall be limited to 110V maximum power design and be encased in protective guards.

h. An earth station must be bonded to a grounding rod.

501-e.104 TEMPORARY OR PORTABLE EARTH STATIONS

Temporary or portable earth stations are not permitted in any residential zoning district. Temporary or portable earth stations are permitted to be used in commercial zoning districts for a period not to exceed 48 hours. Prior to their use, a permit must be obtained from the Dearborn Building & Safety Department. Temporary or portable earth stations must comply with the applicable provisions a-h as listed under Roof Mounted Earth Stations.

501-e. 105 SEVERABILITY

Should any section of this Ordinance be declared unconstitutional, such declaration shall not affect the validity of the remaining sections of the Ordinance.

501-e.106 SIGNAGE OR ADVERTISING

No person shall be permitted to use any part of the earth station for advertising or signage purposes.

501-e.107 PENALTY

The penalty for violating of this ordinance shall be a fine of not less than Twenty-five nor more than Five

Hundred Dollars, or imprisonment not to exceed ninety days, or both fine and imprisonment. Each day that a violation shall be permitted to exist shall constitute a separate offense.

501-e.108 APPEALS

Appeals from decisions of the Department of Building & Safety shall be made to the Zoning Board of Appeals as provided by the Codified Ordinance of the City of Dearborn, Michigan.

501-e.109

Council finds and determines that all formal actions and deliberations of this Council pertaining to the adoption of this ordinance have occurred at meetings open to the public in compliance with the Charter of the City of Dearborn, Michigan and applicable state laws.

501-e.110

This Ordinance shall be in full force and effect from and after its passage, approval by the Mayor, and the earliest period allowed by law.

APPENDIX G

DECLARATORY RULING

-50 FR 38813 printed in FULL format-

(Federal Communications Commission Agency:
Federal Communications Commission)

(September 25, 1985)

47 CFR Part 97
Federal Preemption of State and Local Regulations
Pertaining to Amateur Radio Facilities
[PRB-1; FCC 85-506] 50 FR 38813

ACTION: Declaratory ruling.

SUMMARY: This document declares a limited preemption of state and local regulations which preclude amateur communications. The ruling is necessary so that amateurs and local governing bodies alike will be aware of the strong federal interest in promoting amateur communications. The effect of the ruling is to give local communities and amateur operators a clear statement of the federal interest in amateur communications.

Adopted: September 16, 1985.
Released: September 19, 1985.

ADDRESS: Federal Communications Commission,
Washington, DC 20554.
FOR FURTHER INFORMATION CONTACT:
Maurice J. DePont, Private Radio Bureau,
Washington, DC 20554, (202) 632-4964.

TEXT: SUPPLEMENTARY INFORMATION:
List of Subjects in 47 CFR Part 97
Amateur radio, Antennas, Radio.

MEMORANDUM OPINION AND ORDER

In the matter of Federal preemption of state and local regulations pertaining to Amateur radio facilities; PRB-1.

By the Commission: Commissioner Rivera not participating.

BACKGROUND

1. On July 16, 1984, the American Radio Relay League, Inc. (ARRL) filed a Request for Issuance of a Declaratory Ruling asking us to delineate the limitations of local zoning and other local and state regulatory authority over Federally-licensed radio facilities. Specifically, the ARRL wanted an explicit statement that would preempt all local ordinances which provably preclude or significantly inhibit effective, reliable amateur radio communications. The ARRL acknowleges [*sic*] that local authorities can regulate amateur installations to insure the safety and health of persons in the community, but believes that those regulations cannot be so restrictive that they preclude effective amateur communications.

2. Interested parties were advised that they could file comments in the matter.[n1] With extension, comments were due on or before December 26, 1984,[n2] with reply comments due on or before January 25, 1985[n3]. Over sixteen hundred comments were filed.

LOCAL ORDINANCES

3. Conflicts between amateur operators regarding radio antennas and local authorities regarding restrictive ordinances are common. The amateur operator is governed by the regulations contained in Part 97 of our rules. Those rules do not limit the height of an amateur antenna but they require, for aviation safety reasons, that certain FAA notification and FCC approval procedures must be followed for antennas which exceed 200

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n1 **Public Notice, August 30, 1984, Mimeo. No. 6299, 49 FR 36113, September 14, 1984.**

n2 **Public Notice, December 19, 1984, Mimeo No. 1498.**

n3 **Order, November 8, 1984, Mimeo, No. 770.**

feet in height above ground level or antennas which are to be erected near airports. Thus under FCC rules some amateur antenna support structures require obstruction marking and lighting. On the other hand, local municipalities or governing bodies frequently enact regulations limiting antennas and their support structures in height and location, e.g. to side or rear yards, for health, safety or aesthetic considerations. These limiting regulations can result in conflict because the effectiveness of the communications that emanate from an amateur radio station are directly dependent upon the location and the height of the antenna. Amateur operators maintain that they are precluded from operating in certain bands allocated for there use if the height of their antennas is limited by a local ordinance.

4. Examples of restrictive local ordinances were submitted by several amateur operators in this proceeding. Stanley J. Cichy, San Diego, California, noted that in San Diego amateur radio antennas come under a structures ruling which limits building heights to 30 feet. Thus, antennas there are also limited to 30 feet. Alexander Vrenios, Mundelein, Illinois wrote that an ordinance of the Village of Mundelein provides that an antenna must be a distance from the property line that is equal to one and one-half times its height. In his case, he is limited to an antenna tower for his amateur station just over 53 feet in height.

5. John C. Chapman, an amateur living in Bloomington, Minnesota, commented that he was not able to obtain a building permit to install an amateur radio antenna exceeding 35 feet in height because the Bloomington city ordinance restricted "structures" heights to 35 feet. Mr. Chapman said that the ordinance, when written, undoubtedly applied to buildings but was now being applied to antennas in the absence of a specific ordinance regulating them. There were two options open to him if he wanted to engage in amateur communications. He could request a variance to the ordinance

by way of a hearing before the City Council, or he could obtain affidavits from his neighbors swearing that they had no objection to the proposed antenna installation. He got the building permit after obtaining the cooperation of his neighbors. His concern, however, is that he had to get permission from several people before he could effectively engage in radio communications for which he had a valid FCC amateur license.

6. In addition to height restrictions, other limits are enacted by local jurisdictions — anti-climb devices on towers or fences around them; minimum distances from high voltage power lines; minimum distances of towers from property lines; and regulations pertaining to the structural soundness of the antenna installation. By and large, amateurs do not find these safety precautions objectionable. What they do object to are the sometimes prohibitive, non-refundable application filing fees to obtain a permit to erect an antenna installation and those provisions in ordinances which regulate antennas for purely aesthetic reasons. The amateurs contend, almost universally, that "beauty is in the eye of the beholder." They assert that an antenna installation is not more aesthetically displeasing than other objects that people keep on their property, e.g. motor homes, trailers, pick-up trucks, solar collectors and gardening equipment.

RESTRICTIVE COVENANTS

7. Amateur operators also oppose restrictions on their amateur operations which are contained in the deeds for their homes or in their apartment leases. Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission. However, since some amateurs who commented in this proceeding provided us with examples of restrictive covenants, they are included for information. Mr. Eugene O. Thomas of Hollister, California included in his comments an extract

of the Declaration of Covenants and Restrictions for Ridgemark Estates, County of San Benito, State of California. It provides:

> No antenna for transmission or reception of radio signals shall be erected outdoors for use by any dwelling unit except upon approval of the Directors. No radio or television signals or any other form of electromagnetic radiation shall be permitted to originate from any lot which may unreasonably interfere with the reception of television or radio signals upon any other lot.

Marshall Wilson, Jr. provided a copy of the restrictive covenant contained in deeds for the Bell Martin Addition #2, Irving, Texas. It is binding upon all of the owners or purchasers of the lots in the said addition, his or their heirs, executors, administrators or assigns. It reads: No antenna or tower shall be erected upon any lot for the purposes of radio operations.

William J. Hamilton resides in an apartment building in Gladstone, Missouri. He cites a clause in his lease prohibiting the erection of an antenna. He states that he has been forced to give up operating amateur radio equipment except a hand-held 2 meter (144-148 MHz) radio transceiver. He maintains that he should not be penalized just because he lives in an apartment.

Other restrictive covenants are less global in scope than those cited above. For example, Robert Webb purchased a home in Houston, Texas. His deed restriction prohibited "transmitting or receiving antennas extending above the roof line."

8. Amateur operators generally oppose restrictive covenants for several reasons. They maintain that such restrictions limit the places that they can reside if they want to pursue their hobby of amateur radio. Some state that they impinge on First Amendment rights of free speech. Others believe that a constitutional right is being abridged because, in their view, everyone has a

right to access the airwaves regardless of where they live.

9. The contrary belief held by housing subdivision communities and condominium or homeowner's associations is that amateur radio installations constitute safety hazards, cause interference to other electronic equipment which may be operated in the home (televisions, radio, stereos) or are eyesores that detract from the aesthetic and tasteful appearance of the housing development or apartment complex. To counteract these negative consequences, the subdivisions and associations include in their deeds, leases or by-laws restrictions and limitations on the location and height of antennas or, in some cases, prohibit them altogether. The restrictive covenants are contained in the contractual agreement entered into at the time of the sale or lease of the property. Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.

SUPPORTING COMMENTS

10. The Department of Defense (DOD) supported the ARRL and emphasized in its comments that continued success of existing national security and emergency preparedness telecommunications plans involving amateur stations would be severely diminished if state and local ordinances were allowed to prohibit the construction and usage of effective amateur transmission facilities. DOD utilizes volunteers in the Military Affiliate Radio Service (MARS),[n4] Civil Air Patrol (CAP) and the Radio Amateur Civil Emergency Service (RACES). It points out that these volunteer communicators are operating radio equipment installed in their homes and that undue restrictions on antennas by local authorities

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n4 MARS is solely under the auspices of the military which recruits volunteer amateur operators to render assistance to it. The Commission is not involved in the MARS program.

adversely affect their efforts. DOD states that the responsiveness of these volunteer systems would be impaired if local ordinances interfere with the effectiveness of these important national telecommunication resources. DOD favors the issuance of a ruling that would set limits for local and state regulatory bodies when they are dealing with amateur stations.

11. Various chapters of the Amercian [*sic*] Red Cross also came forward to support the ARRL's request for a preemptive ruling. The Red Cross works closely with amateur radio volunteers. It believes that without amateurs' dedicated support, disaster relief operations would significantly suffer and that its ability to serve disaster victims would be hampered. It feels that antenna height limitations that might be imposed by local bodies will negatively affect the service now rendered by the volunteers.

12. Cities and counties from various parts of the United States filed comments in support of the ARRL's request for a Federal preemption ruling. The comments from the Director of Civil Defense, Port Arthur, Texas are representative:

> The Amateur Radio Service plays a vital role with our Civil Defense program here in Port Arthur and the design of these antennas and towers lends greatly to our ability to communicate during times of disaster.
>
> We do not believe there should be any restrictions on the antennas and towers except for reasonable safety precautions. Tropical storms, hurricanes and tornadoes are a way of life here on the Texas Gulf Coast and good communications are absolutely essential when preparing for a hurricane and even more so during recovery operations after the hurricane has passed.

13. The Quarter Century Wireless Association took a strong stand in favor of the issuance of a declaratory

ruling. It believes that Federal preemption is necessary so that there will be uniformity for all Amateur radio installations on private property throughout the United States.

14. In its comments, the ARRL argued that the Commission has the jurisdiction to preempt certain local land use regulations which frustrate or prohibit amateur radio communications. It said that the appropriate standard in preemption cases is not the extent of state and local interest in a given regulation, but rather the impact of that regulation of Federal goals. Its position is that Federal preemption is warranted whenever local governmental regulations relate adversely to the operational aspects of amateur communication. The ARRL maintains that localities routinely employ a variety of land use devices to preclude the installation of effective amateur antennas, including height restrictions, conditional use permits, building setbacks and dimensional limitations on antennas. It sees a declaratory ruling of Federal preemption as necessary to cause municipalities to accommodate amateur operator needs in land use planning efforts.

15. James C. O'Connell, an attorney who has represented several amateurs before local zoning authorities, said that requiring amateurs to seek variances or special use approval to erect reasonable antennas unduly restricts the operation of amateur stations. He suggested that the Commission preempt zoning ordinances which impose antenna height limits of less than 65 feet. He said that this height would represent a reasonable accommodation of the communication needs of most amateurs and the legitimate concerns of local zoning authorities.

OPPOSING COMMENTS

16. The City of La Mesa, California has a zoning regulation which controls amateur antennas. Its comments reflected an attempt to reach a balanced view.

This regulation has neither the intent, nor the effect, of precluding or inhibiting effective and reliable communications. Such antennas may be built as long as their construction does not unreasonably block views or constitute eyesores. The reasonable assumption is that there are always alternatives at a given site for different placement, and/or methods for aesthetic treatment. Thus, both public objectives of controlling land use for the public health, safety, and convenience, and providing an effective communications network, can be satisfied.

A blanket ruling to completely set aside local control, or a ruling which recognizes control only for the purpose of safety of antenna construction, would be contrary to legitimate local control.

17. Comments from the County of San Diego state:

While we are aware of the benefits provided by amateur operators, we oppose the issuance of a preemption ruling which would elevate 'antenna effectiveness' to a position above all other considerations. We must, however, argue that the local government must have the ability to place reasonable limitations upon the placement and configuration of amateur radio transmitting and receiving antennas. Such ability is necessary to assure that the local decision-makers have the authority to protect the public health, safety and welfare of all citizens.

In conclusion, I would like to emphasize an important difference between your regulatory powers and that of local governments. Your Commission's approval of the preemptive requests would establish a 'national policy'. However, any regulation adopted by a local jurisdiction could be overturned by your Commission or

a court if such regulation was determined to be unreasonable.

18. The City of Anderson, Indiana, summarized some of the problems that face local communities:

> I am sympathetic to the concerns of these antenna owners and I understand that to gain the maximum reception from their devices, optimal location is necessary. However, the preservation of residential zoning districts as 'liveable' neighborhoods is jeopardized by placing these antennas in front yards of homes. Major problems of public safety have been encountered, particularly vision blockage for auto and pedestrian access. In addition, all communities are faced with various building lot sizes. Many building lots are so small that established setback requirements (in order to preserve adequate air and light) are vulnerable to the unregulated placement of these antennas.
>
> . . . the exercise of preemptive authority by the FCC in granting this request would not be in the best interest of the general public.

19. The National Association of Counties (NACO), the American Planning Association (APA) and the National League of Cities (NLC) all opposed the issuance of an antenna preemption ruling. NACO emphasized that federal and state power must be viewed in harmony and warns that Federal intrusion into local concerns of health, safety and welfare could weaken the traditional police power exercised by the state and unduly interfere with the legitimate activities of the states. NLC believed that both Federal and local interests can be accommodated without preempting local authority to regulate the installation of amateur radio antennas. The APA said that the FCC should continue to leave the issue of regulating amateur antennas with the local government and with the state and Federal courts.

DISCUSSION

20. When considering preemption, we must begin with two constitutional provisions. The tenth amendment provides that any powers which the constitution either does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the states. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. Article III, Section 2. Given these basic premises, state laws may be preempted in three ways: First, Congress may expressly preempt the state law. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicity [*sic*] be preempted. Such intent to preempt could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. See *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Finally, preemption may be warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142, 143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes, *Fidelity Federal Savings & Loan Association* v. *de la Cuesta, supra.*

21. The situation before us requires us to determine the extent to which state and local zoning regulations may conflict with federal policies concerning amateur radio operators.

22. Few matters coming before us present such a clear dichotomy of viewpoint as does the instant issue. The cities, counties, local communities and housing associations see an obligation to all of their citizens and try to address their concerns. This is accomplished through regulations, ordinances or covenants oriented toward the health, safety and general welfare of those they regulate. At the opposite pole are the individual amateur operators and their support groups who are troubled by local regulations which may inhibit the use of amateur stations or, in some instances, totally preclude amateur communications. Aligned with the operators are such entities as the Department of Defense, the American Red Cross and local civil defense and emergency organizations who have found in Amateur Radio a pool of skilled radio operators and a readily available backup network. In this situation, we believe it is appropriate to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters. The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides.

23. Preemption is primarily a function of the extent of the conflict between federal and state and local regulation. Thus, in considering whether our regulations or policies can tolerate a state regulation, we may consider such factors as the severity of the conflict and the reasons underlying the state's regulations. In this regard, we have previously recognized the legitimate and important state interests reflected in local zoning regulations. For example, in *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), we recognized that

> . . . countervailing state interests inhere in the present situation . . . For example, we do not wish to preclude a state or locality from exercising jurisdiction over certain elements of an SMATV operation that properly may fall within its

authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the non-federal regulation is applied in a nondiscriminatory manner.

24. Similarly, we recognize here that there are certain general state and local interests which may, in their even-handed application, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service.[n5] Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.

25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur

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n5 47 CFR Part 97.

communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for international amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.[n6]

26. Obviously, we do not have the staff or financial resources to review all state and local laws that affect amateur operations. We are confident, however, that state and local governments will endeavor to legislate in a manner that affords appropriate recognition to the important federal interest at stake here and thereby avoid unnecessary conflicts with federal policy, as well as time-consuming and expensive litigation in this area. Amateur operators who believe that local or state governments have been overreaching and thereby have precluded accomplishment of their legitimate communications goals, may, in addition, use this document to bring our policies to the attention of local tribunals and forums.

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n6 We reiterate that our ruling herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern this Commission.

27. Accordingly, the Request for Declaratory Ruling filed July 16, 1984, by the American Radio Relay League, Inc., is granted to the extent indicated herein and, in all other respects, is denied.

Federal Communications Commission

William J. Tricarico,
Secretary.

[FR Doc. 85-22968 Filed 9-24-85; 8:45 am]

APPENDIX H

DEFENDANT'S EXHIBIT 8